No. 76-1768

In the Supreme Court of the United States

OCTOBER TERM, 1977

FRED C. TALLANT, SR., AND WILLIAM M. WOMACK, JR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 547 F. 2d 1291. The opinions of the district court are reported at 407 F. Supp. 878 and 407 F. Supp. 896.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1977. The petition for a writ of certiorari was filed on June 3, 1977, and therefore is substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on appeal from a conviction following a voluntary, intelligent and unconditional plea of *nolo contendere*, the court of appeals properly refused to consider alleged errors in the procedures employed in returning the indictment.

STATEMENT

1. An indictment filed on April 17, 1974, in the United States District Court for the Northern District of Georgia charged petitioners, officers and directors of the Preferred Land Corporation, with making fraudulent representations in connection with the intrastate offering and sale of the corporation's securities, in violation of 15 U.S.C. 77q(a) (counts 1-5), mail fraud, in violation of 18 U.S.C. 1341 (counts 6-10), and conspiracy to commit those offenses, in violation of 18 U.S.C. 371 (count 11). In addition, petitioner Womack was charged with falsifying business records submitted to the Securities and Exchange Commission, in violation of 18 U.S.C. 1505 (count 12) (Pet. App. 2a).

Following the district court's denial of their motion to dismiss the indictment (407 F. Supp. 878),[1] petitioners agreed to plead *nolo contendere* on condition that they be allowed to withdraw their pleas if they were dissatisfied with the sentence imposed. The court refused to accept these conditional pleas (407 F. Supp. 896, 898).[2] The next day, immediately before trial was scheduled to begin, petitioners tendered unconditional pleas of *nolo contendere* to

[1]As noted by the court of appeals, petitioners also made a number of unsuccessful collateral attacks upon the validity of their prosecution (Pet. App. 2a-3a, n. 2).

[2]The background of petitioners' *nolo contendere* pleas is set forth in the district court's opinion denying their motion for bail pending appeal (407 F.Supp. 896).

all counts of the indictment.[3] After considerable and detailed discussions with counsel for petitioners and the government, the court accepted the pleas (*ibid.*).

At the sentencing proceeding, petitioners expressed their full awareness of the effects of a plea of *nolo contendere* (Tr. 32, 54). Petitioner Tallant was sentenced to three years' imprisonment, all but three months of which was suspended in favor of five years' probation, and was fined a total of $40,000. Petitioner Womack was sentenced to three years' imprisonment, all but two months of which was suspended in favor or five years' probation, and was fined a total of $15,000 (Pet. 3).

2. On appeal from their convictions, petitioners conceded that their *nolo contendere* pleas were knowledgeable and intelligent (Br. 21), but they nonetheless asserted as error the claims previously denied by the district court in their motion to dismiss the indictment. The court of appeals affirmed (Pet. App. 1a-17a). It found that the bulk of petitioners' contentions involved "nonjurisdictional" defects that could not be raised on appeal from a conviction based upon a plea of *nolo contendere* (*id.* at 3a-5a) and that the remainder of petitioners' claims were insubstantial (*id.* at 6a-17a).[4]

[3]Petitioner Tallant's plea covered counts 1 through 11, while petitioner Womack's plea covered counts 1 through 12 (Pet. App. 3a, n. 3).

[4]The court refused to consider the following questions (Pet. App. 3a-5a and n. 4):

> 1. Whether the grand jury returning the indictment was randomly selected from a fair cross section of the community.
>
> 2. Whether the indictment should have been dismissed because one of the grand jurors was disqualified as a convicted felon.
>
> 3. Whether the trial court properly refused to permit appellants to inspect the grand jury minutes to determine

ARGUMENT

Petitioners' sole contention is that the court of appeals erred in refusing to pass upon the merits of each of their

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whether that body was prejudiced by pre-indictment publicity causing a denial of due process.

4. Whether the District Court properly refused to grant appellants permission to inspect grand jury minutes to determine whether the United States Attorney substituted his judgment for that of the grand jury causing a denial of due process.

5. Whether the District Court should have dismissed the indictment on grounds of prejudicial pre-indictment publicity.

6. Whether the indictment was invalid because inherently prejudicial by reason of misjoinder of parties and offenses.

7. Whether the United States Attorney abused his discretion by procuring the indictment on the basis of the grand jury's misunderstanding of the law.

8. Whether the indictment was unauthorized by the United States Attorney General and obtained in violation of Section 20 of the Securities Act of 1933.

However, the court did consider petitioners' other claims of error, which the court held had survived their pleas of *nolo contendere*. These issues included:

1. Whether the indictment charged offenses within the criminal jurisdiction of the federal courts.

2. Whether Section 17 of the Securities Act of 1933 (15 U.S.C. 77(q)(a)) is constitutional.

3. Whether the prosecution was untimely under the statute of limitations.

The court of appeals determined that each of these allegations was without merit (*id.* at 4a, n. 4, 6a-17a), a conclusion petitioners have not contested in this Court. In addition, although the court below concluded that petitioners' contention that the district court incorrectly imposed fines or penalties was not reviewable (*id.* at 4a, n. 4), the court did consider, and properly rejected, this claim (*id.* at 5a, n. 6).

arguments. The court correctly concluded, however, that several of petitioners' points on appeal had been waived by their voluntary and intelligent pleas of *nolo contendere*, which "remove[d] the issue of factual guilt from the case" (*Menna* v. *New York*, 423 U.S. 61, 62, n. 2) and precluded appellate consideration of claimed violations of rights that preceded the plea and involved neither the jurisdiction of the district court nor the power of the government to prosecute. See *United States* v. *Michigan Carton Co.*, 552 F. 2d 198, 201 (C.A. 7). The claims that the court of appeals refused to consider challenged only the procedures employed in returning the indictment and did not call into question the validity of the charges, the power of the government to institute them, or the authority of the district court to render judgment and impose punishment. Compare *Menna* v. *New York*, *supra*, 423 U.S. at 62-63 and n. 2. Accordingly, as a result of the entry of valid *nolo contendere* pleas, petitioners would not have been entitled to a reversal of their convictions even if their numerous allegations of legal error in the obtaining of the indictment were correct.

Once petitioners chose to bypass the orderly procedure for litigating their claims in order to obtain the benefits of an unconditional plea of *nolo contendere*, the government acquired a legitimate expectation of finality in the resulting convictions. See *Lefkowitz* v. *Newsome*, 420 U.S. 283, 289. Petitioners' *nolo contendere* pleas, just like pleas of guilty, therefore represented "a break in the chain of events which * * * preceded [them] in the criminal process." *Tollett* v. *Henderson*, 411 U.S. 258, 267. Moreover, like pleas of guilty, the pleas of *nolo contendere* were a complete admission of guilt. As this Court stated in *Lott* v. *United States*, 367 U.S. 421, 426:[5]

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[5]In considering the timeliness, under the Federal Rules of Criminal Procedure, of the defendants' motions in arrest of judgment and, hence, the timeliness of their appeals, the Court concluded in *Lott* that "it was

> Although it is said that a plea of *nolo contendere* means literally "I do not contest it," * * * and "is a mere statement of unwillingness to contest and no more," * * * it does admit "every essential element of the offense [that is] well pleaded in the charge." * * * Hence, it is tantamount to "an admission of guilt for the purposes of the case," * * * and "nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record," * * *.

Hence, "[f]or purposes of the criminal case in which the plea is entered, a conviction on a *nolo* plea is equivalent to a conviction on a plea of guilty." 8 Moore's *Federal Practice*, para. 11.07, p. 11-112 (2d ed. 1976). See *United States* v. *Kondos*, 509 F. 2d 1147, 1148 (C.A. 7); *McGrath* v. *United States*, 402 F. 2d 466, 467 (C.A. 7). See generally *United States* v. *Mizell*, 488 F. 2d 97, 99-100 (C.A. 5). In sum, the court of appeals properly determined that petitioners' challenge to the procedures underlying their indictment did not survive their pleas of *nolo contendere*.

While the circuits are in general agreement concerning the extremely narrow scope of review on appeal after pleas

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the judgment of conviction and sentence, not the tender and acceptance of the pleas of *nolo contendere*, that constituted the 'determination of guilt' within the meaning of Rule 34 [Fed. R. Crim. P.]." 367 U.S. at 426. Petitioners have misread *Lott* in asserting that the court of appeals "proceeded upon a wrong view of the law in treating the appeal as [one] 'from a conviction founded on a *nolo contenaere* plea'" (Pet. 4-5). Here, as in *Lott*, petitioners were "convicted," and their guilt conclusively determined, when the district court entered judgment and imposed sentence following their pleas of *nolo contendere*. "Conviction" of course occurs when judgment is entered, not when the plea—whether guilty or *nolo contendere*—is accepted. See. Fed. R. Crim. P. 32(b)(1).

of guilty or *nolo contendere*, certain courts of appeals have chosen in some cases to review particular legal questions despite the entry of such pleas. See Pet. 6-7; *United States* v. *Mizell*, *supra*. Since each of these cases was decided prior to this Court's decisions in *Tollett* and *Menna*, which clarified the relatively narrow scope of review after a plea of guilty or *nolo contendere*, it is unlikely that any conflict among the circuits continues to exist. However, to the extent that this variation in past practice suggests a continuing conflict, this case is an inappropriate vehicle in which to resolve it.

None of the issues that the court of appeals refused to consider in this case—which esentially related to the procedures by which the indictment was obtained—would have been held reviewable in the other circuits. Thus, petitioners did not contend that their pleas were involuntary (*Doran* v. *Wilson*, 369 F. 2d 505 (C.A. 9); *Briley* v. *Wilson*, 376 F. 2d 802 (C.A. 9)) or that the government was foreclosed from bringing charges against them (*Menna* v. *New York*, *supra*). Nor does this case present an "exceptional situation" as was present in *Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 412, where, subsequent to the defendants' pleas of *nolo contendere*, the Court resolved a statutory uncertainty that was central to the issue of criminal liability. Finally, as noted earlier (see note 4, *supra*), the court of appeals specifically considered petitioners' claim that the prosecution was barred by the statute of limitations, and thus the decision below is entirely consistent with *Jaben* v. *United States*, 333 F. 2d 535 (C.A. 8), affirmed, 381 U.S. 214.[6]

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[6]The remaining cases cited by petitioners are equally unavailing. In view of the district court's rejection of petitioners' conditional pleas of *nolo contendere* and their subsequent tender of unconditional *nolo* pleas, it is clear that no agreement was made to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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preserve certain issues for appeal. Compare *United States* v. *Cook*, 463 F. 2d 123, 125 (C.A. 5); *United States* v. *Rosenberg*, 458 F. 2d 1183, 1184 (C.A. 5), certiorari denied, 409 U.S. 868; *United States* v. *Mann*, 451 F. 2d 346, 347 (C.A. 2); *United States* v. *Grassia*, 354 F. 2d 27, 29 (C.A. 2), vacated and remanded on other grounds, 390 U.S. 202; *United States* v. *Doyle*, 348 F. 2d 715 (C.A. 2), certiorari denied, 382 U.S. 843. Moreover, there is not applicable here any statute expressly authorizing review of certain issues on appeal following convictions based on pleas of guilty or *nolo contendere*. See *Lefkowitz* v. *Newsome*, *supra*; *United States ex rel. Rogers* v. *Warden of Attica State Prison*, 381 F. 2d 209 (C.A. 2). Nor is this a case in which the defendant was adjudged guilty on stipulated facts; this Court has indicated that in such circumstances (which do not include a formal admission of guilt) the defendant may present on appeal any issue that he would have been entitled to raise after trial. *Lefkowitz* v. *Newsome*, *supra*, 420 U.S. at 290-291, n. 7. See also *United States* v. *Wysocki*, 457 F. 2d 1155, 1158 (C.A. 5), certiorari denied, 409 U.S. 859. Finally, unlike *United States* v. *De Costa*, 435 F. 2d 630, 632 (C.A. 1), in which the court of appeals pretermitted decision of the appealability issue by finding that the defendant's claims were insubstantial, petitioners have not claimed that their prosecution was barred by the Speedy Trial Clause of the Sixth Amendment.